Yellow Taxi Company of Minneapolis, d/b/a Suburban Yellow Taxi Company and Guild of Taxi Drivers and Associated Workers, Local Lodge 3025, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees. Case 18-CA-5506

July 2, 1982

## SUPPLEMENTAL DECISION AND ORDER

On May 5, 1980, the National Labor Relations Board issued its Decision and Order in the aboveentitled proceeding,1 finding that Suburban Yellow Taxi Company (herein called Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by withdrawing recognition from, and refusing to bargain with, Guild of Taxi Drivers and Associated Workers, Local Lodge 3025, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (herein called the Union). The Board ordered Respondent to cease and desist therefrom and to take certain affirmative action to remedy the unfair labor practices.

The Board, sua sponte, has decided to reconsider its original Decision and Order to the extent set forth below. By letter dated October 7, 1980, all parties were informed of this decision to reconsider the original Decision and Order, and were advised to submit statements of position. Thereafter, both the General Counsel and Respondent filed statements of position.

In our original Decision and Order we adopted the findings of the Administrative Law Judge who stated that the facts in this case are "not materially distinguishable" from those presented in Yellow Cab Company, 229 NLRB 1329 (1977) (herein called Chicago Yellow Cab), and we cited as additional support for our decision Air Transit, Inc., 248 NLRB 1302 (1980). The United States Court of Appeals for the District of Columbia disagreed with Chicago Yellow Cab's finding that the cabdrivers were employees rather than independent contractors, and denied enforcement of the Board's Order. Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. N.L.R.B., 603 F.2d 862 (1978), rehearing denied 603 F.2d 891 (1979).

Subsequent to the original Decision and Order herein the D.C. Circuit in City Cab Company of Orlando, Inc. v. N.L.R.B., 628 F.2d 261 (1980) (herein called City Cab of Orlando), approved the Board's finding of employee status for cab drivers, noting lando. In view of City Cab of Orlando, we have decided to reconsider the original Decision and Order herein in order to highlight several features present in the record.2 The lease agreement herein states that an em-

differed substantially from that in City Cab of Or-

ployer-employee relationship does not exist and is not intended to exist between the parties to the lease. However, diligent reexamination of the record reveals significant discrepancies between the relationship described in the lease agreement and that which actually exists. The reality of the situation convinces us that Respondent retains not only control over the result to be achieved, but also the means by which that result is effected.

Thus, the lease agreement specifies that a "Lessee shall not be required to furnish Lessor any trip sheet or other record of Lessee's activities unless required by applicable law." However, contrary to this lease provision, Respondent imposes a trip sheet requirement far in excess of that necessary for lessees to comply with applicable law. Respondent's cabs are licensed in Burnsville, Bloomington, Edina, Eden Prairie, Richfield, and at the airport. Richfield and the airport require that trip sheets be submitted by taxi drivers to the local authorities. Respondent has transformed this requirement of two localities into a blanket rule that lessees maintain trip sheets for all their trips and submit them directly to Respondent.

In addition, and in contrast to the lease agreement which provides that, "Any rates of fares suggested by Lessor which are not regulated by law, ordinance or governmental rules or regulations are merely for the information of Lessee and Lessee is not obligated to charge such rates," Respondent has contracted with certain customers to furnish transportation, usually for packages, at flat rates which are negotiated and not regulated by law.3 Since Respondent maintains flat-rate agreements with 25 or 30 corporate customers, this represents

<sup>2</sup> Respondent urges that the Board is bound by the Administrative

Law Judge's finding that this case is not materially distinguishable from

that the work relationship in Chicago Yellow Cab

Chicago Yellow Cab, and, citing our Rules and Regulations, Sec. 102.46(h), moves that the Board strike the General Counsel's statement of position because no exceptions were taken to that finding. We deny Respondent's motion. "Even absent an exception, the Board is not compelled to act as a mere rubber stamp for its [Administrative Law Judges]. The narrow construction of the rule for which the respondent contends is, we think, inadmissible, for it would unduly cripple the Board in its administration of the Act." N.L.R.B. v. WTVJ, Inc., 268 F.2d 346, 348 (5th Cir. 1959). Reconsideration of the record in the instant proceeding, moreover, discloses differences between this case and Chicago Yellow Cab which establish that our earlier adoption of the Administrative Law Judge's conclusion that the facts are "not materially distinguishable" from those in Chicago Yellow Cab was unwarranted. It is axiomatic that each case must be resolved upon the basis of its own individual record; and as the decision herein makes clear, there exist material dissimilarities between the two cases.

<sup>&</sup>lt;sup>3</sup> Some of these agreements even prohibit accepting tips.

<sup>1 249</sup> NLRB 265.

a significant restriction on a lessee's manner of conducting business. Further, Respondent's airport delivery rates also limit a lessee's freedom. These rates are set unilaterally by Respondent based on its determination of the shortest route from the airport to the delivery destination, regardless of detours or traffic jams. Respondent insists that lesses who overcharge flat-rate customers, or who fail to charge for the shortest airport delivery route, reimburse Respondent (which will in turn refund the overcharge to the customer) for the overcharge. Respondent determines in summary fashion if there has been an overcharge, and will deny a lease to a driver who refuses to comply with the reimbursement policy.

The trip sheet, flat-rate agreements, and airport delivery rates function as a monitoring device by which Respondent keeps track of the amount of business generated for Suburban Yellow Taxi Company's drivers. The record evidences that Respondent jealously guards this complex system of control by denying leases to drivers who solicit flat-rate customers without receiving a dispatch radio call, or who refuse to reimburse Respondent for overcharges, thereby significantly restricting a lessee's opportunity to exercise entrepreneurial initiative in the manner in which he conducts his business. This complicated control mechanism militates strongly in favor of an employer-employee relationship.

While some, but not all, of these requirements are mandated by municipal ordinance, nevertheless it is possible for the mandatory legal requirements to become so detailed, and consequently bind the parties so closely together operationally, that compliance prevents the existence of an independent contractor relationship, and rather ensures that of employer-employee. Moreover, some of the company requirements are not mandated by ordinance; regulations by the Company regarding the flat-rate agreements, tips, and luggage runs are not governed by local law.

In addition, Respondent operates a radio dispatch and an airport starter system which further define the employer-employee relationship. One lessee, who estimated that 70 percent of his business is provided by radio dispatch, tellingly remarked that "this isn't New York or Chicago as far as people thinking taxi and just grabbing cabs off the curb or off the street." Although a lessee may be free to decline dispatch orders, he is in reality

• The manner in which airport delivery orders are received insures that Respondent knows the destination of each delivery. dependent upon that system for it is his primary supplier of business.

Regarding the airport starter system, technically, a lessee may refuse an order from the airport starter. However, in order to refuse effectively an airport order, the lessee must do so before he knows what the order is! To discover how profitable an airport order might be, a driver must leave his cab to answer the airport starter's call, and at that point a driver is deemed to have accepted the order. The driver's option, once he knows what the order entails, is to complete it, refuse it and lose his place in the cab line, or leave the airport. Since a driver knows that he may have to wait several hours before another starter call, he is effectively prevented from refusing airport orders.

Other factors that manifest an employer-employee relationship are:

- 1. Respondent prohibits subleasing. Respondent actively polices this restriction by spot checking to determine whether lessees have sublet cabs in violation of the prohibition.
- 2. Respondent instructs lessees to keep mileage to a minimum.
- Respondent unilaterally determines fault in case of an accident.
- 4. Respondent receives reports about speeding and warns lessees against repetition.
- 5. Respondent maintains a bulletin board on which it posts sundry instructions with which lessees are expected to be familiar, such as against congregating in a private parking lot.
- 6. The goodwill generated by performance of the service provided inures to the benefit of Respondent. We base this conclusion on the following factors: Cabs carry Respondent's name and phone number; lessees are given items to distribute (e.g., matchbooks, business cards, calendars) to customers which publicize Respondent's name and phone number; lessees must clean and wash their cabs; lessees are prohibited from accepting tips from certain clients; customer complaints are grounds for denial of a lease. Most important, Respondent has experimented with several different types of leases, and has unilaterally changed the financial terms of the lease arrangement. These unilateral changes, coupled with Respondent's ability, through the trip sheets, flat-rate agreements, airport delivery rates, and charge slip system, 6 to monitor a driver's overall business, suggest that Respondent's standard rental fees may be directly related to, and vary according to, the total volume of business generated by the lessees.

The lease agreement provides that "Lessee shall not be restricted in any manner as to the area in which Lessee may operate the Taxicab." Nevertheless, Respondent forbids lessees from operating independently at numerous locations throughout the Company's jurisdiction.

<sup>&</sup>lt;sup>6</sup> The charge slip system, described in detail by the Administrative Law Judge, is another method by which lessees account to Respondent for each day's revenue.

- 7. Lessees are expected to keep their radios on at all times while on duty, although the lease agreement states that "Lessee shall not be required to report the location or whereabouts of the Taxicab at any time during the lease period."
- 8. Respondent sets de facto hours of employment for the lessees. While it is true that the driver has some flexibility in this regard and can if he wishes work unlimited hours upon occasion, the fact remains that Respondent starts its 12- and 24-hour leases at 6 a.m., and accordingly its 12-hour night lease at 6 p.m.; and in any event implicit in the Administrative Law Judge's finding that de facto hours are set is that there are certain minimum hours a lessee must work, but no limit to the number of hours a lessee may work.
- 9. Lessees acquire no equity in the cabs. Indeed, frequent reassignment of cabs is a real possibility because of the greater number of lessees than cabs.
- 10. Lessees have a permanent working relationship with the Company, under which they may continue as long as their performance is satisfactory. We do not believe that the short-term aspect of the leases intimates otherwise, for in reality leases are denied only when Respondent unilaterally decides that a lessee's performance is unsatisfactory.

Finally, although stated previously, we note again that Respondent retains the ultimate penalty, which is to deny individuals the opportunity to renew a lease. And, further, Respondent has not been chary in exercising this sanction. Over a 22-month period, while leasing to 240 drivers, Respondent refused leases to approximately 21 applicants—almost 10 percent of the total number of drivers. Thus, each lessee is aware not merely of the potency of the threat of ultimate sanction, but also that the sanction is exercised without hesitancy.

In sum, we find, inter alia, that Respondent requires its drivers to maintain trip sheets and mandates an extensive system of flat-rate fares drivers must charge; that Respondent in effect controls the drivers' source of business; that Respondent significantly regulates the hours that the drivers may work; and that Respondent is the recipient of the goodwill generated by the services drivers provide. We conclude that these characteristics reflect the method by which Respondent effectively retains control over the manner in which its drivers perform their duties. See City Cab of Orlando, 628 F.2d at 264-266. We therefore find that the taxicab drivers are employees within the meaning of the Act.

## **ORDER**

It is hereby ordered that the Order in Yellow Taxi Company of Minneapolis, d/b/a Suburban Yellow Taxi Company, 249 NLRB 265 (1980), be, and it hereby is, affirmed.

## MEMBER ZIMMERMAN, concurring:

I agree with my colleagues that the drivers who work for Respondent are employees within the meaning of the Act, and that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from, and refusing to bargain with, the Union. I write separately only to address the decision of the United States Court of Appeals for the District of Columbia Circuit in Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America, AFL-CIO v. N.L.R.B., 603 F.2d 862 (1978), and its impact on this case. In that case, the court denied enforcement of the Board's conclusion in Yellow Cab Company, 229 NLRB 1329 (1977), that the cabdrivers were employees. Here, the Administrative Law Judge found that the facts in these two cases are "not materially distinguish-

In Seafarers, the court took note of what it considers to be "an unusual degree of confusion and vacillation" in this area. It reviewed a series of Board decisions which it found to demonstrate "diametrically" opposite conclusions on the basis of virtually identical facts in cases involving the issue of whether cabdrivers are employees or independent contractors.8 I believe the court's harsh criticism of the Board for its seeming vacillation in this area is unwarranted. It fails to recognize both the nature of the Board's decisionmaking process and our implicit congressional mandate. In each of these cases, as the court itself acknowledged in Seafarers, there are factors indicative of an employee-employer relationship, and conversely of an independent contractor relationship. Thus, as the Board has often said, it must analyze the facts presented in the particular case, balance them, and arrive at a result.9 It must be expected, therefore, that various Board Members, after analyzing the facts in distinct cases, have struck the required balance somewhat differently. 10 That result, more-

<sup>7 603</sup> F.2d at 869.

<sup>&</sup>lt;sup>8</sup> The court also noted that the respondent in Seafarers set up a lease arrangement identical to that found by the Board in Columbus Green Cabs. Inc.; et al., 214 NLRB 751 (1974), to constitute independent contractor status. 603 F.2d at 870.

<sup>&</sup>lt;sup>9</sup> Twin City Freight, Inc., S & B Nelson, Inc., 221 NLRB 1219 (1975); Yellow Cab Company, 229 NLRB at 1332.

<sup>10</sup> The Board has utilized the "right of control" test for distinguishing between employees and independent contractors which it has defined as follows:

over, is inherent in the congressional scheme, which is hardly designed to exalt permanency in the Board's interpretation and application of the Act. Section 3 of the Act provides for Board Members to be appointed by the President for staggered 5-year terms and authorizes the Board to delegate its decisionmaking powers to three-member panels. So, as much as the parties who depend on the processes of the NLRB deserve consistent and predictable decisions, and as much as that ought to be a highly sought goal of any administrative agency, it is clear that Congress assured only short-term stability in Board law by making the Board, and therefore its application of precedent to a particular set of facts, somewhat susceptible to change brought about by the annual appointment process.

In finding the cabdrivers in Seafarers to be independent contractors, the court relied primarily on two factors: its finding that the lessor cab company lacked control of the manner and means in which drivers carry on their business after they leave the garage, and its finding no relation between the compensation received by the cab company for the lease of the cab to the amount of fares collected by the lessee-drivers. Although the court noted that the drivers had some indicia of employee status, it minimized the importance of those factors. The court found that "[w]hen a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company involved does not exert control over 'the means and manner' of his performance."11 The court concluded that the cabdrivers were independent contractors because it found that the cab company has no financial incentive to impose controls on the drivers and that the drivers are out prospecting for fares in their own self-interest. It was crucial to the court's decision that the company had surrendered the right to make the drivers account for their earnings. Thus, although the appearance of leased cabs might be identical to that of commission cabs, the court saw the economic realities of the two systems as quite different because in the former the lessee-driver's labor does not benefit the lessor.

With all due respect, I find that the analysis and conclusions in Seafarers are not cognizant of the

peculiarities of the taxi industry as they pertain to the employment relationship. While the court acknowledges the extremely short-term duration of the leases, it finds this does not affect the relationship between the cab company and the cabdriver during the term of the lease. Thus, the court seems to conclude that a lease is the sine qua non of an independent contractor relationship. This analysis, however, begs the issue and misapplies the right-ofcontrol test to the circumstances of this industry. Although the cab company does not exert control over the drivers' specific actions once inside the cab, drivers who operate on a 24-hour lease without the right to sublease are nevertheless subject to substantial control by the cab company. The unrestricted right to cancel the lease of any driver who fails to perform adequately in any way gives the cab company, at any 24-hour juncture, essentially total control over which drivers will receive a lease and which drivers will no longer receive a lease. 12

As the court acknowledges, whether the driver works for a commission, or leases a cab on a daily basis, does not vary the degree of control the cab company exercises over the driver's actions in the cab. In either situation, the basic "control" really required is no more than to insure that the driver diligently and successfully prospects for fares. In N.L.R.B. v. United Insurance Co. of America, et al., 390 U.S. 254 (1968), the Supreme Court affirmed the Board's conclusion that insurance agents were employees even though they spent the majority of their worktime beyond their employer's control. A 24-hour lease arrangement, 13 with lease termination at the company's will coupled with mileage and subleasing limitations, imposes control by the company over the driver analogous to that in United Insurance. It allows the cab company the virtually unfettered right to terminate a driver. Given the nature of the occupation, an unsuccessful driver may be easily replaced. As the Board noted in Air Transit, Inc., 248 NLRB 1302, fn. 30 (1980), "it is the right to control, not the actual exercise of control, which is the determinative factor." While I fully agree with my colleagues in the majority that the additional factors on which they rely indicate such control, I would adhere to the view, expressed in our decision in Yellow Cab Company, 229 NLRB 1329, and in our original decision in this case, that a short-term lease, cancelable at will, containing mileage restrictions and subleasing prohibitions, also indicates such control.

An employer-employee relationship exists when the person for whom the services are performed retains the right to control both the result to be achieved and the manner and means to be used in achieving it. An independent contractor relationship exists if the employer reserves only the right to control the results to be achieved.

In applying this test, the Board has used an "all of the circumstances" approach and no one factor is determinative. See *National Freight, Inc.*, 146 NLRB 144 (1964); *Sida of Hawaii, Inc.*, 191 NLRB 194 (1971).

<sup>11 603</sup> F.2d at 879.

<sup>18</sup> See Yellow Cab Company, 229 NLRB at 1332.

<sup>18</sup> The court in Seafarers acknowledges this arrangement involves "substantial" driver funds, amounting to approximately \$7,000 per year.

This is not to suggest that I would find an employer-employee relationship between a cab company and its drivers in every case in which a lease arrangement is involved. However, in analyzing and balancing the facts of any particular case, I believe some indicia should be regarded as particularly relevant to finding employee or independent contractor status. For example, driver ownership or substantial investment in the cab (such as a longterm lease) should be highly indicative of an independent contractor relationship. And, merely leasing the use of the cab company's radio dispatching service would not contradict such independent contractor status.<sup>14</sup> Conversely, where the only investment by the driver in the instrumentalities of his work is a 24-hour lease payment, and there is a mileage limitation and a prohibition on subleasing as in this case and Yellow Cab Company, supra, there is a strong indication of employee status.

For these reasons, I respectfully disagree with the court's decision in *Seafarers* and would adhere to the Board's original decision in this case.

## CHAIRMAN VAN DE WATER, dissenting:

The Administrative Law Judge in this case found the "facts not materially distinguishable" from Yellow Cab Company, 15 herein called Chicago Yellow Cab. Recognizing that the United States Court of Appeals for the District of Columbia's decision in Chicago Yellow Cab<sup>16</sup> compels a different result, the Administrative Law Judge nonetheless found that the cabdrivers were employees rather than independent contractors because he was bound to follow Board precedent. Subsequently, over then Member Penello's dissent which stated that "my colleagues . . . agree that the facts here are not materially distinguishable from those present in" Chicago Yellow Cab, the Board adopted the Administrative Law Judge's findings, including the critical finding that the instant case was indistinguishable from Chicago Yellow Cab.

Now my colleagues insist that the instant case more closely resembles City Cab Company of Orlando, Inc., et al. v. N.L.R.B., 17 a case the District of Columbia Court of Appeals distinguished from Chicago Yellow Cab. I believe the Board correctly concluded in the original decision in this case that the facts of Chicago Yellow Cab and those herein are indistinguishable. Accordingly, I would, as then Member Penello did in Chicago Yellow Cab and the original Decision and Order herein, find the cabdrivers to be independent contractors.

17 628 F.2d 261 (D.C. Cir. 1980).

The majority attempts to convey the impression that Respondent controls every facet of a lessee's employment. However, the characteristics upon which the majority focuses are of only minimal significance in analyzing whether an employer-employee relationship exists, see 603 F.2d at 878 and fn. 45, and, upon closer scrutiny of some of the more potentially relevant characteristics advanced for their conclusion, one discovers a fragile house of cards rather than a solid infrastructure.

For example, the majority weaves together a trip sheet requirement and certain mandatory flat rates and airport delivery rates to find that Respondent monitors lessees' and its own earnings. In reality, lessees maintain trip sheets because they are required to do so by municipal ordinances. And, as the Chicago Yellow Cab court made clear, the "general insistence that the driver comply with the law is not the type of control of a driver that will create an employee relationship since the source of the control is statutory law and municipal regulations." 603 F.2d at 901. Furthermore, the record reflects that lessees may refuse orders and prospect for fares in the manner they deem most profitable. Since Respondent acts merely as a clearinghouse for lessees in connection with radio dispatch and airport orders, and since the Company receives no money from services provided by lessees to flaterate customers, there is no incentive for Respondent to monitor the amount of business generated by lessees. Consequently, the majority's finding that Respondent uses the trip sheets, flat-rate agreements, and airport delivery rates to control lessees is unwarranted.

Next, the majority states that the radio dispatch and the airport system for assigning orders makes a lessee dependent upon Respondent, and finds, as did the City Cab of Orlando court, that the Company substantially controls passenger selection. The Administrative Law Judge herein made no such findings, not could he, since the record is devoid of information regarding the percentage of a lessee's total business represented by the radio dispatch and airport system. 18 Further, the City Cab of Orlando court's finding that the company controlled passenger selection was based not only on evidence of the percentage of a driver's business generated independently, but on the company's admission that it could refuse to rent a cab to drivers who ignored a dispatcher's instructions. In the instant case the Administrative Law Judge credited testimony that

<sup>&</sup>lt;sup>14</sup> See Sida of Hawaii, Inc., v. N.L.R.B., 512 F.2d 354 (9th Cir. 1975).
<sup>15</sup> 229 NLRB 1329 (1979).

<sup>16 603</sup> F.2d 862 (1978), rehearing denied 603 F.2d 891 (1979).

<sup>&</sup>lt;sup>18</sup> In fact, the only reference by the Administrative Law Judge to this subject was that one driver testified that he received *more than 30 percent* of his business from sources independent of the Company or the airport starter system—a substantially greater percentage than found in *City Cab* of *Orlando*, and certainly not a negligible amount of business.

"lessees are free to refuse orders for runs, without penalty, and dispatchers are so instructed." Consequently, not even the threat of retaliation for refusing orders, which the City Cab of Orlando court found crucial, is present in this case.

In addition, the majority finds this, similar to City Cab of Orlando, the goodwill generated by performance of the cab service inures to the benefit of Respondent. Even if this is true, as Chicago Yellow Cab noted, it is "of minor importance." However, it is doubtful whether the instant case and City Cab of Orlando are alike in this respect. Here, the lessees pay a flat fee for the use of their cabs, and all fares they collect belong exclusively to them. As stated earlier, the record will not sustain the assertion that Respondent monitors lessees' performance to make them account for their earnings, nor that Respondent manipulates the leasing fee arrangement so as to vary the amounts lessees earn. Therefore, the tangible manifestation of goodwill engendered by the cab service (i.e., the revenue, over and above the flat leasing fee, resulting from prompt and courteous service) inures to the lessees.

Regarding a lessee's hours of work, the majority apparently believes the Administrative Law Judge's finding that the Company sets de facto hours of work resembles the court's finding in City Cab of Orlando that the "company significantly regulates the hours that drivers work." However, the Administrative Law Judge herein also found that "[t]here are no limits on the hours lessees may work." Further, the majority fails to mention that Respondent also leases cabs on a weekly basis, insuring lessees the freedom to determine their work schedules over a 7-day period. 19 Finally, it is significant that the same day/night/24-hour leasing system existed in Chicago Yellow Cab, and did not persuade the court that the company regulated drivers' hours of work. See 603 F.2d at 881, fn. 51.20

Thus, it is obvious that the characteristics that distinguished City Cab of Orlando from Chicago Yellow Cab are significant only by their absence in the instant case. Indeed, the District of Columbia Court of Appeals has already intimated as much:

The [Suburban Yellow Taxi Company] decision is not now before us for review, so we express no opinion about it. We do not note that, unlike the case before us where the Board was

at some pains to point out significant factual differences between it and [Chicago Yellow Cab], the Board majority in [Suburban] made no reference to this court's opinion in [Chicago Yellow Cab]. [628 F.2d 261, fn. 11 (emphasis supplied).]

Here, on facts "not materially distinguishable" from Chicago Yellow Cab, an objective appraisal reveals that the lease agreement utilized by the Company was taken verbatim from the lease considered in Chicago Yellow Cab; that the lessee drivers do not work for hire, wages, or salary, or under supervision; that the lessee drivers pay only their leasing fees to the Company, and the Company has no right to obtain, for its own benefit, any accounting of the lessee drivers' earnings; that the lessee drivers depend for their income solely upon their own initative and the profits derived from the difference between their cost of leasing and operating the cab and what they collect in fares.

As the D.C. Circuit in the original *Chicago* Yellow Cab succinctly noted:

When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company involved does not exert control over "the means and manner" of his performance. [603 F.2d at 879.]

I believe that the majority offers no convincing argument for distinguishing that case from the instant case. Accordingly, I would find that the lessee drivers herein are independent contractors rather than statutory employees,<sup>21</sup> and therefore would dismiss the complaint.

<sup>&</sup>lt;sup>19</sup> Further distinguishing the instant case from City Cab of Orlando is the fact that lessees are not subject to termination of leasing privileges if they do not purchase services for 5 consecutive days.

<sup>20</sup> Other factors relied on by the majority, such as the lack of equity in

<sup>\*\*</sup>Other factors relied on by the majority, such as the lack of equity in cabs argument, have been dispositively discarded by the D.C. Circuit (the capital investment of lessee drivers herein is virtually identical to that of lessee drivers in Chicago Yellow Cab).

<sup>22</sup> Reported at 249 NLRB 265 (1980).

MEMBER HUNTER, dissenting:

I agree with the Administrative Law Judge and with my dissenting colleague that this case and Yellow Cab Company, 229 NLRB 1329 (1977), enforcement denied 603 F.2d 862 (D.C. Cir. 1978) "are not materially distinguishable." I was not on the Board when it issued its Decision and Order<sup>22</sup> in the instant case. However, I have reviewed care-

fully the underlying record in light of the views expressed by the circuit court. Based on my reading of the record as a whole, I am not persuaded by the majority's analysis, as set forth in its initial Decision and Order, and reiterated herein, that the drivers who work for Respondent are employees within the meaning of the Act, and thus that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from, and refusing to bargain with, the Charging Party. Accordingly, I dissent.

<sup>22</sup> Reported at 249 NLRB 265 (1980).